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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LAWRENCE S. JACKMAN, JR.,

Plaintiff and Respondent,

v.

KRISTA BAROUDI, et al.,

Defendants and Appellants.

D043212

(Super. Ct. No. GIC813749)

APPEAL from an order of the Superior Court of San Diego County, Kevin A. Enright, Judge. Affirmed.

Krista Baroudi, Frank Baroudi, Kay Heron, Neil Heimburge and Erik Heimburge (collectively appellants) appeal the denial of their special motion to strike pursuant to the anti-SLAPP statute (strategic lawsuit against public participation), Code of Civil Procedure section 425.16 (hereafter section 425.16). They contend the court erred in failing to strike Lawrence S. Jackman, Jr.'s seventh cause of action alleging appellants

breached their fiduciary duty by using corporate funds and employees for personal benefit and by filing a "meritless lawsuit" for "ulterior and improper reasons."

## FACTS

The appellants, as well as Jackman, are shareholders in La Jolla Cove Motel and Hotel Apartments, Inc. (hereafter the Corporation). The shareholders are all descendants of the original owner, Max Heimburge, or their spouses.

In 1996, Jackman was elected president and CEO of the Corporation and in 1997 became a member of the Corporation's board of directors. Beginning in the summer of 2001, the board of directors began questioning Jackman's use of the Corporation's credit card. Jackman eventually admitted charging personal expenses on the credit card amounting to over \$100,000, and using corporate funds to pay for work at his house. According to Jackman, the previous president had used corporate funds for personal expenditures and Jackman believed this was part of his compensation as president and CEO.

On September 6, 2001, Jackman's employment with the Corporation was terminated.

In November 2002, the Corporation sued Jackman and others in *La Jolla Cove Motel and Hotel Apartments, Inc., et al. v. Lawrence S. Jackman, Jr., et al.* (Superior Court case No. GIC794273) (*La Jolla Cove*), alleging in its first amended complaint causes of action for conversion, breach of fiduciary duty, fraudulent misrepresentation, constructive fraud, conspiracy, money had and received, reasonable value of work, and

an accounting based on the use of corporate funds, assets, and employees for personal benefit and attempts to hide these transactions.

On July 3, 2003, Jackman sued appellants and the Corporation for conversion, an accounting, rescission, breach of contract, breach of the covenant of good faith and fair dealing, extortion and breach of fiduciary duty alleging appellants used corporate funds for personal benefit, had entered into sham settlement agreements with the Corporation to repay the amounts taken for personal benefit, had wrongfully forced Jackman to resign by making frivolous and bad faith threats of criminal prosecution, and owed him money. At issue here is Jackman's seventh cause of action that alleged, in pertinent part:

"[D]efendants . . . have each repeatedly used the funds, assets, and employees of the Corporation as they choose, for personal benefits unrelated to the business of the Corporation. *These defendants also caused the meritless lawsuit entitled [La Jolla Cove] to be filed for ulterior and improper motives*, including but not limited to attempting to force . . . Jackman to surrender his ownership interest in the Corporation without receiving payment in return for the fair market value of said ownership interest. For all of the reasons set forth herein, these defendants have caused substantial loss and damage to the Corporation and its shareholders, in an amount to be determined at trial." (Italics added.)

Appellants filed an anti-SLAPP motion seeking to strike the seventh cause of action, contending it came within the scope of the anti-SLAPP statute because it sought damages for the appellants' constitutionally protected right to petition, that is, to file a lawsuit, and that Jackman could not establish a probability of prevailing on this cause of action. They contended the seventh cause of action actually stated a claim for malicious prosecution based on the filing of the *La Jolla Cove* lawsuit and Jackman could not

prevail on a malicious prosecution action because the *La Jolla Cove* lawsuit was still pending.

Jackman opposed the motion, arguing the allegation relating to the *La Jolla Cove* lawsuit addressed a failure to comply with corporate formalities before filing the lawsuit.

The trial court denied appellants' motion to strike. The court found appellants had "made a prima facie showing the Seventh Cause of Action for Breach of Fiduciary Duty arises from protected activity," noting that while there were other allegations in the cause of action which did not arise from protected activities, "the statute cannot be frustrated by combining protected and nonprotected activity." The court, however, found Jackman had "shown a probability of prevailing on the cause of action for breach of fiduciary duty" because Jackman had supported his allegation that appellants used corporate funds, business assets and employees for personal benefit with deposition testimony of current and former employees of the Corporation.

## DISCUSSION

### I

#### *Anti-SLAPP Statute and Standard of Review*

"Section 425.16, known as the anti-SLAPP statute, permits a court to dismiss certain types of nonmeritorious claims early in the litigation." (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.)

In determining whether a motion to strike should be granted under the anti-SLAPP statute, "[f]irst, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16,

subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e).' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) One of the categories spelled out in section 425.16, subdivision (e) is an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.' " (§ 425.16, subd. (e)(4).) The filing of a lawsuit is an exercise of the party's constitutional right of petition. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) If the court finds that the defendant has made a showing that the complaint or cause of action is within the scope of the anti-SLAPP statute, the burden shifts "and the plaintiff must show a probability of prevailing on the claim." (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 45.)

"Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten, supra*, 29 Cal.4th 82, 89.) On appeal we apply a de novo standard of review. (*Padres, L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 509; *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

## II

### *The Seventh Cause of Action is not Encompassed by the Anti-SLAPP Statute*

Appellants contend the trial court correctly determined the seventh cause of action was within the scope of the anti-SLAPP statute but erred in failing to strike the cause of action on the basis of a finding Jackman was likely to prevail on the cause of action.

Appellants contend the court erred in focusing on whether Jackman was likely to prevail on his claim that corporate funds and employees were used for personal benefit rather than on whether Jackman was likely to prevail on his allegation that appellants had filed a meritless lawsuit, i.e., would prevail on a malicious prosecution action.

To support their argument, appellants cite language from *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308 stating "a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action.' " In *Martinez v. Metabolife Int'l, Inc.* (2003) 113 Cal.App.4th 181, 188, we noted this language was dictum and pointed out the converse was also true, that is, "a defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant." We concluded "it is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Ibid*, italics omitted; *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 686; *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414-415.) As the court explained in *Wilcox v. Superior Court*, (1994) 27 Cal.App.4th 809, 820, overruled on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, footnote 5, "Thus, if the defendant's act was a lawsuit against a developer the defendant would have a prima facie

First Amendment defense. [Citation.] But, if the defendant's act was burning down the developer's office as a political protest the defendant's motion to strike could be summarily denied without putting the developer to the burden of establishing the probability of success on the merits in a tort suit against defendant."

Here, the principal thrust or gravamen of Jackman's seventh cause of action is a breach of fiduciary duty by the misuse of corporate funds, assets, and employees for personal benefit, conduct involving a nonprotected activity. The allegation appellants also caused the filing of the "meritless" *La Jolla Cove* lawsuit appears to be only an evidentiary allegation—an example of how appellants had misused corporate funds and not a separate cause of action seeking damages for malicious prosecution.<sup>1</sup> The trial court correctly focused on the evidence relating to the misuse of corporate funds in determining whether appellants' anti-SLAPP motion should be granted.

We conclude appellants failed to meet their burden of making a prima facie case the seventh cause of action arose from protected activity; the cause of action was for breach of fiduciary duty by the misuse of corporate funds, a nonprotected activity. Since

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<sup>1</sup> We note such an interpretation is consistent with Jackman's arguments below that the lawsuit allegation was not intended to allege a malicious prosecution cause of action but was directed to appellants' failure to comply with corporate formalities before filing the lawsuit. If we were to interpret the seventh cause of action as seeking recovery for malicious prosecution, such a cause of action would be stricken under the anti-SLAPP statute. Appellants are correct that a malicious prosecution cause of action is encompassed by the anti-SLAPP statute (see *Chavez v. Mendoza, supra*, 94 Cal.App.4th 1083, 1087) and thus Jackman would have the burden of showing he was likely to prevail on such a cause of action. Such a showing is highly unlikely since we have taken judicial notice of the verdict in *La Jolla Cove* against Jackman, which, at a minimum, establishes appellants had probable cause to file the lawsuit.

appellants failed to make their prima facie case, it is not necessary to examine whether Jackman was likely to prevail on his claim for breach of fiduciary duty.

#### DISPOSITION

The order is affirmed. Jackman is awarded costs on appeal.

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McCONNELL, P. J.

WE CONCUR:

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McDONALD, J.

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McINTYRE, J.